

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CRAIG CURTIS SILL,

Defendant.

Case No. 2:12-cr-00429-JCM-GWF

**FINDINGS &
RECOMMENDATIONS**

Motion to Suppress (#51)

This matter is before the Court on Defendant Craig Curtis Sill's Motion to Suppress Evidence for Fourth Amendment Violation (#51), filed on May 20, 2013. The Government filed its Response in Opposition to Defendant's Motion to Suppress (#60) on June 6, 2013. The Court conducted an evidentiary hearing on June 27, 2013.

Defendant Craig Curtis Sill is charged in a three count indictment with conspiracy to manufacture a controlled substance, manufacture of a controlled substance, and possession of a controlled substance in violation of 21 U.S.C. §846, §841(a)(1) and (b)(1)(C), and 18 U.S.C. §2. *Indictment (#1)*. The indictment arises from evidence seized during the execution of a search warrant at Defendant's house on September 6, 2012. Defendant moves to suppress the seized evidence on the grounds that the search warrant application was based on information obtained during prior warrantless entries into his house that violated the Fourth Amendment. The Government contends that the prior entries were justified under the exigent circumstances exception to the Fourth Amendment's warrant requirement.

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FACTUAL BACKGROUND

1. Contents of the Search Warrant Declaration.

On September 6, 2011, Detective Randy Dockery of the Las Vegas Metropolitan Police Department (LVMPD) applied to a Clark County, Nevada justice-of-the-peace for a telephonic search warrant to search Defendant Sill's house for evidence relating to the manufacture and possession of Dimethyltryptamine (DMT). *Motion to Suppress (#51), Exhibit A, Search Warrant Declaration (hereinafter "Declaration")*. In support of the issuance of the search warrant, Detective Dockery's declaration stated as follows:

On September 6, 2011, LVMPD Officer Allan Dong went to 239 E. Maulding Avenue, Las Vegas, Nevada to investigate a report by a neighbor that an ex-tenant of 239 E. Maulding had just broken into the house. The neighbor stated the ex-tenant attempted to open the front door with a key, but when that didn't work, went around to the side of the residence. Detective Dockery's declaration, stated "[t]he subject left prior to Officer Dong's arrival." *Id.*, pg. 33. When Officer Dong arrived, he observed that a window was broken out and a door was open. The officers then cleared the house for suspects. The declaration further stated:

Officer Dong went into the room in the southwest corner of the residence off of the kitchen. Officer Dong observed jars of suspicious brown liquid, lye and other items he believed to be associated with controlled substances. Officer Dong requested Narcotics Detectives to respond. Prior to your Affiant's arrival the subject seen by the neighbor came back to the house and met with Officer Dong.

Declaration, pg. 33.

Detective Dockery stated that upon his arrival at the residence, he spoke with the subject, Marshall Gunnell, who told him he had been house sitting for the owner, Craig Curtis Sill, who had left the residence on August 24, 2011 to go to the "Burning Man" festival in Northern Nevada. Mr. Gunnell said that he stayed in his camper in front of the house, but went inside the house on occasion. On September 2, 2011, Mr. Gunnell observed a Constable sticker on the front door of the house. He then left and returned on September 6th. Mr. Gunnell observed that the lockout sticker was gone, the back door was open and stereo speakers were outside in the backyard. Mr. Gunnell called Mr. Sill who asked him to go back to the house and keep watch over the residence.

1 Detective Dockery's declaration then stated:

2 Your Affiant went into the residence with Officer Dong to look at the
3 suspicious items. There were several bags of mimosa roots, bottles
4 of lye, cans of Naptha fuel, and several jars of brown liquid. Your
5 Affiant determined that the suspects were manufacturing DMT,
6 Dimethyltryptamine. A recipe for the extraction process was on top
7 of the jars of suspicious brown liquid. . . .

8 *Declaration, pg. 34.*

9 The declaration goes on to describe the manner in which DMT is used, its effect on the
10 mind and its classification as a Schedule I Controlled Substance. It also set forth the manufacturing
11 process of DMT. *Id. pg. 34.* Based on Detective Dockery's declaration, the justice-of-the-peace
12 issued the search warrant. The police then executed the warrant and seized paperwork and
13 numerous items allegedly used in the manufacture of DMT.

14 **2. Officer Dong's Testimony.**

15 Officer Allan Dong testified at the evidentiary hearing. Officer Dong has been employed as
16 a patrol officer with the LVMPD for 18 1/2 years. During his career he has been assigned to the
17 vice and criminal intelligence units. Officer Dong has received training in narcotics offenses and
18 commonly encounters illegal drugs as a police officer. He also received basic training about illegal
19 drug laboratories in the police academy. Officer Dong was taught to look for elements of drug labs
20 such as "pyrex" (glass cooking equipment), pseudoephedrine, lye and similar things. He was
21 taught to observe different types of narcotics manufacturing. He was also taught that drug labs
22 have a "volatile nature," i.e. they may blow-up, and he received general training regarding the
23 dangers of various chemicals used in illegal drug labs. Officer Dong estimated that he has
24 encountered 30-40 drug labs during his 18 years with the LVMPD. These were either
25 methamphetamine labs or marijuana grow operations. In connection with methamphetamine labs,
26 he has observed the presence of lye, respirators, pyrex, and waste material. He testified that when
27 he encounters a suspected illegal narcotics laboratory, he will contact the Narcotics Bureau to
28 respond because patrol officers do not have the equipment or training to deal with such labs "on a
daily basis."

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1 Officer Dong testified that he went to 239 E. Maulding Avenue on September 6, 2011 in
2 response to a call from a neighbor who observed a man trying to get into the house that had been
3 sealed by the Constable's Office--an orange sticker had been placed on the front door. The
4 neighbor reported that the man tried the front door with a key, couldn't get in and then went around
5 to the back. Officer Dong arrived at the house approximately 10-20 minutes after the neighbor
6 called the police. He testified there had been a couple of prior calls for police service at 239 E.
7 Maulding Avenue during the week leading up to September 6th. He believed the house had been
8 "cleared" on those prior occasions, but he did not know if police officers had actually entered the
9 house.

10 Officer Dong was accompanied to the house by his partner, Officer Rossi. He believes a
11 third officer may have also responded. He described the house as a two story older custom house
12 on a half-acre lot, with a large pool in the back. The house was located in a residential
13 neighborhood, but there are also commercial buildings in the area. Upon arriving at the house,
14 Officer Dong observed the broken Constable's seal on the front door. The front door was locked.
15 He testified that a Constable's seal is placed on a building when there has been an order of eviction.
16 Officer Dong walked around to the eastside of the house where he observed a broken window. He
17 then went down to the basement area, where he found an open door. He testified the door was
18 "cracked" open. Officer Dong entered the house through the open door to determine if an intruder
19 was inside. No one was found in the house.

20 Officer Dong testified that there was graffiti or artwork painted on the walls inside the
21 house. There was very little furniture in the rooms and pillows were scattered around. There was
22 a plexiglass floor on a second floor landing area. It appeared to Officer Dong that only part of the
23 house was being used for living purposes. It appeared to be a "party house." There was a painted
24 sign on the wall that gave instructions or stated the cost of admission. *See Government's Exhibit 1,*
25 *photograph.*

26 While searching the house for a possible intruder, Officer Dong entered a small bedroom
27 located off the kitchen. In this bedroom, he observed glass mason jars containing a dark liquid, a
28 respirator, coffee filters, a container of lye, drain cleaner and tree branches. He also observed a

1 single piece of paper, with an equation written on it, sitting on top of the mason jars. Officer Dong
2 testified that the equation concerned him because it indicated some form of laboratory. The
3 appearance of the liquid in the jars was not something Officer Dong had previously seen. He stated
4 that coffee filters and respirators are commonly used in illegal drug manufacturing. Officer Dong
5 also thought a toxic substance might be present because of the presence of the lye and the
6 respirator. There were also plastic bags in the room that contained a red powdery substance. The
7 bags were labeled "mimosa hostilis." (It was not clear from the testimony whether Officer Dong
8 observed the wording on the labels during his initial entry or when he returned to the room with
9 Detective Dockery.) Officer Dong did not know the meaning of "mimosa hostilis."

10 Officer Dong testified that he called a Narcotics Bureau sergeant while he was still inside
11 the house. He told the sergeant that he really didn't know what he had, but he suspected possible
12 narcotics manufacture. The sergeant told him to stand by and he would send someone. Officer
13 Dong testified that based on what he had observed in the bedroom, he believed there was probable
14 cause for a search warrant. He did not have the expertise to deal with narcotics laboratories,
15 however, and the Narcotics Bureau was better able to handle the situation and the potential dangers
16 than he was.

17 Officer Dong testified that after he exited the house, he spoke to the neighbor who had
18 called the police. Officer Dong testified that he was not informed before entering the house that the
19 person who attempted to enter the house had left the property before the officers arrived. Officer
20 Dong stated that he had observed a white car parked in the cul-de-sac when he arrived at the
21 property. An RV (motor home) later arrived and parked in the driveway of the house. Officer
22 Dong also spoke to the driver of the RV, Marshall Gunnell, after he exited the house. Mr. Gunnell
23 stated that the owner of the house, Mr. Sill, was at the "Burning Man" festival. Officer Dong
24 testified that he is aware that hallucinogenic drug use is associated with the Burning Man festival.

25 Detective Dockery arrived at 239 E. Maulding Avenue approximately 30 minutes after
26 Officer Dong spoke to the Narcotics Bureau sergeant. Officer Dong told Detective Dockery about
27 the written equation, lye, drain cleaner, and jars of liquid in the bedroom and that he suspected
28 some type of drug manufacturing in the house. Officer Dong and Detective Dockery then entered

1 the house and proceeded directly to the bedroom where Officer Dong had observed the suspicious
2 items. He stated that Detective Dockery did not enter any parts of the house other than those he
3 had to walk through to get to the bedroom. Officer Dong estimated that he and Detective Dockery
4 were inside the house for 10-15 minutes. They exited the house by the same route. He did not
5 recall whether Detective Dockery spoke to Mr. Gunnell before they entered the house.

6 Officer Dong acknowledged on cross examination that there was no overwhelming odor
7 coming out of the house. He did not observe any open flames or anything cooking inside the
8 residence. Nor did he observe any glass cooking equipment, such as he has seen in connection with
9 methamphetamine labs. Officer Dong did not see any containers of Naptha in the bedroom where
10 the other items were found. He did not believe the building was going to blow up at any minute.
11 Officer Dong testified on redirect examination, however, that some chemicals or chemical
12 combinations are combustible or present a danger of explosion even if no heat source is present.
13 He also thought it was possible that he had been exposed to toxic chemicals. He therefore believed
14 the items constituted a potential danger to the police officers and neighbors in the vicinity of the
15 house. Officer Dong acknowledged that he and Detective Dockery did not wear any protective gear
16 or respirators when they re-entered the house.

17 **3. Detective Dockery's Testimony.**

18 Detective Randy Dockery testified that he has been employed by the LVMPD for sixteen
19 years and has been a narcotics detective for the past eleven years. He has received specialized
20 training in narcotics and narcotics offenses, including a week long Drug Enforcement
21 Administration (DEA) course regarding clandestine drug laboratories during which the students
22 manufactured illegal drugs. Detective Dockery learned of the dangers associated with drug labs,
23 including fire and odorless phosphine gas which is a byproduct of methamphetamine production.
24 Detective Dockery testified that he has investigated between 50 and 100 illegal drug labs. With the
25 exception of this case, all of the illegal drug labs were methamphetamine labs. He was involved in
26 the investigation of a methamphetamine lab that caused a fire in a condominium complex. In
27 another investigation, he and other officers were required to enter a building "fully encapsulated" in
28 protective gear and breathing equipment to deal with an active methamphetamine lab. Detective

1 Dockery testified that a flame or heat source is not always required for there to be a danger of
2 explosion from chemicals used in drug labs.

3 Detective Dockery testified that if patrol officers encounter a suspicious substance they
4 believe is drug related, they will call the Narcotics Bureau for assistance. All of the narcotics
5 detectives are lab and "hazmat" (hazardous materials) certified. If the patrol officers do not believe
6 the suspicious substance is drug related, they will call the ARMOR Detail which deals with
7 suspected bombs and poisons such as ricin or anthrax. Detective Dockery testified that in
8 responding to a request for assistance at the scene of a suspected drug lab, the narcotics detectives
9 first assess the situation by asking the patrol officers what they have seen and smelled. The
10 detectives also ask the officers if they are feeling any symptoms, such as lightheadedness or
11 wooziness, which would indicate they have been exposed to toxic chemicals. The detectives'
12 initial priority is safety. They seek to determine whether the suspected drug lab is active and
13 whether evacuations of neighbors may be necessary.

14 Detective Dockery testified that items commonly found in methamphetamine labs include
15 chemicals, and fuels such as Naptha or Coleman fuel, red phosphorous and iodine. Waste products
16 from pseudoephedrine capsules are also commonly found. Other items associated with the
17 production of methamphetamine include coffee filters, rags, tubing, and pyrex glass containers used
18 in the cooking process.

19 Prior to the instant case, Detective Dockery had never investigated a case involving
20 Dimethyltryptamine (DMT). Nor had he even heard of the drug. As a result of this investigation,
21 he learned that DMT is a powerful hallucinogen drug made from the naturally occurring mimosa
22 hostilis root. Dimethyltryptamine is extracted from the mimosa hostilis root bark through a
23 chemical process. Detective Dockery generally described the process as involving the grinding of
24 the mimosa hostilis root bark into a powdery substance. The powder is mixed with Naptha and lye
25 and then frozen until it crystalizes. No fire or cooking is required to produce DMT.

26 Detective Dockery testified that on September 6, 2011 his sergeant directed him to go to
27 239 E. Maulding Avenue to meet with Officer Dong regarding a suspected drug lab. Detective
28 Dockery was familiar with Officer Dong and knew that he had been employed as a LVMPD officer

1 for many years. Upon arriving at 239 E. Maulding Avenue, Detective Dockery saw Officer
2 Dong's patrol vehicle in front of the residence. He described the neighborhood as an area of nice
3 custom or semi-custom homes on large lots. The subject house was a large home and was situated
4 on a half-acre lot. Officer Dong told Detective Dockery that he was not sure what he had. Officer
5 Dong described what he observed in the bedroom of the house. He stated he observed a suspicious
6 dark brown liquid in jars and a chemical equation written on a paper lying on top of the jars. He
7 also stated he saw a respirator and "Red Devil" lye. Officer Dong told him: "I don't know what it
8 is." Officer Dong also stated: "It looks like they're making methamphetamine, but its suspicious,
9 something's not right." Based on what Officer Dong described, Detective Dockery thought it
10 possible the liquid was methamphetamine which has a dark red color when mixed with red
11 phosphorous. Detective Dockery testified that respirators are typically present in
12 methamphetamine labs. He also testified that the LVMPD has not encountered as many
13 methamphetamine labs in recent years as they formerly did. Most of the methamphetamine labs are
14 "box labs," meaning that the cooking process has been completed.

15 Detective Dockery testified that Officer Dong's information caused him concern that
16 dangerous chemicals might be present in the house. He believed it was necessary to inspect the
17 items to see what "we are dealing with" and decide whether there was a high level of danger such
18 that neighbors should be evacuated and Officer Dong should be medically examined. Before
19 entering the house, Detective Dockery also spoke with Marshall Gunnell who told him the house
20 belonged to Mr. Sill. Mr. Gunnell stated that he had come by the house a few days earlier at which
21 time there was an eviction notice or Constable's sticker on the door. He returned to the house on
22 September 6th and noticed that the sticker was gone. Mr. Gunnell stated that he had spoken to Mr.
23 Sill who told him he was out of town and asked Mr. Gunnell to watch the house. Mr. Gunnell told
24 Detective Dockery he intended to stay at the property in his motor home and keep an eye on it for
25 Mr. Sill. Mr. Gunnell also said Mr. Sill was at the Burning Man festival in Northern Nevada.
26 Detective Dockery testified that it is his understanding that widespread marijuana and
27 hallucinogenic drug use occurs at the Burning Man festival. Detective Dockery has not attended
28 the Burning Man festival and it was not clear whether his understanding about drug use at the

1 Burning Man festival comes from law enforcement sources.

2 Detective Dockery testified that he and Officer Dong entered the house through the front
3 door. They walked to southwest corner of the house, through the kitchen, and into the rear
4 bedroom where the suspicious items were located. Detective Dockery saw a respirator and nine or
5 ten jars containing a "bi-layer" liquid that was dark brown in color. He also observed a cardboard
6 box on the floor which contained several sticks that looked like "firewood" kindling. There were
7 several plastic bags containing a reddish brown powder. Detective Dockery observed that the label
8 on these bags stated "mimosa hostilis." Detective Dockery was not familiar with this term. He
9 also observed the written "equation" which he later learned was the recipe for DMT. He also saw
10 the container of Red Devil lye.

11 Detective Dockery testified the bi-layer liquid was suspicious. The term bi-layer means
12 that different substances in the container have not mixed and thus are in different layers. Liquid
13 methamphetamine appears in such a bi-layer form. He also observed residue in empty cups which
14 indicated that they had been used in some type of process. He also saw coffee filters and syringes
15 which can be used as filtering or measuring devices in the production of illegal drugs. Based on
16 what he observed, Detective Dockery believed the items were part of a drug lab. Detective
17 Dockery did not recall seeing Naptha in the bedroom where the other items were located.
18 However, he saw cans of Naptha in the center room or main room of the house as he walked to and
19 from the bedroom.

20 Detective Dockery testified that he and Officer Dong were in the bedroom "maybe one
21 minute" and were inside the house a total of one minute and fifteen seconds. They exited the house
22 by the same route they entered. Detective Dockery testified that if Officer Dong estimated they
23 were in the room 10-15 minutes, he would be wrong. Detective Dockery testified he did not intend
24 to stay inside the house a long time or to touch any items. He went in to inspect the items that
25 Officer Dong had seen and to determine if there was a danger or hazard that needed to be dealt
26 with. He did not believe it necessary to wear a respirator or protective clothing before entering the
27 house.

28 . . .

1 After exiting the house, Detective Dockery used his I phone to “google,” i.e. research, the
2 term *mimosa hostilis*. He learned that it is the precursor or primary ingredient for DMT. Based on
3 his observations, Detective Dockery determined the items in the house did not pose a danger to
4 officers or others in the area. He testified there was “nothing bubbling, nothing cooking, no fire or
5 any kind of heat source or electricity” that would pose a danger. There was also nothing to indicate
6 that Officer Dong would have health problems from exposure to dangerous substances. Detective
7 Dockery testified that he then called the rest of the narcotics team to come to the house.

8 Detective Dockery testified on cross-examination that prior to entering the house, he asked
9 Officer Dong to tell him what he had observed. He did not ask Officer Dong specific questions
10 such as whether there was an open flame. He may have asked follow-up questions about things
11 Officer Dong said he observed. Detective Dockery did not specifically recall asking Officer Dong
12 if anything was bubbling. He did not ask Officer Dong if he smelled anything suspicious.
13 Detective Dockery stated the main fear in a methamphetamine lab is the presence of phosphine gas
14 which is odorless. He acknowledged, however, that there may be odorous fumes associated with an
15 active methamphetamine lab. Detective Dockery did not smell any odors coming from the house.
16 Detective Dockery reiterated that Officer Dong told him “he thought it was some type of lab, but he
17 wasn’t sure” what it was.

18 DISCUSSION

19 The Fourth Amendment provides that “[t]he right of the people to be secure in their
20 persons, houses, papers and effects, against unreasonable searches and seizures, shall not be
21 violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,
22 and particularly describing the place to be searched and the persons or things to be seized.”
23 Warrantless entries into the home are presumptively unreasonable. *United States v. Perea-Rey*, 680
24 F.3d 117, 1186 (9th Cir. 2012), quoting *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 63
25 L.Ed.2d 639 (1980).

26 An exception to the warrant requirement exists, however, when “the exigencies of the
27 situation make the needs of law enforcement so compelling that the warrantless search is
28 objectively reasonable under the Fourth Amendment.” *United States v. Snipe*, 515 F.3d 947, 950

(9th Cir. 2008), quoting *Mincey v. Arizona*, 437 U.S. 385, 393-94, 98 S.Ct. 2408 (1978) (internal quotation marks omitted). “Exigent circumstances are defined to include those circumstances that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.” *Fisher v. City of San Jose*, 558 F.3d 1069, 1075 (9th Cir. 2009) (internal quotation marks omitted). *See also United States v. Snipe*, 515 F.3d at 950 (“The need to protect or preserve life or avoid serious injury is one such justification for what would be otherwise illegal absent exigency or emergency.”). The government has the burden of proving that exigent circumstances rendered a warrantless search reasonable. *Huff v. City of Burbank*, 632 F.3d 539, 545 (9th Cir. 2011), citing *Welsh v. Wisconsin*, 466 U.S. 740, 749-50, 104 S.Ct. 2091 (1984). That burden is especially heavy when the exception must justify a warrantless entry of the home. *United States v. Martinez*, 643 F.3d 1292, 1296 (10th Cir. 2011).

In *Brigham City v. Stuart*, 547 U.S. 398, 126 S.Ct. 1943, 1948 (2006), the Supreme Court held that a police officer’s subjective motivation is irrelevant to determining whether a warrantless entry is justified under the exigent circumstances exception. The court must decide, based the totality of the circumstances, whether the officer’s action was objectively reasonable and whether the manner of the officer’s entry was also reasonable. *See also United States v. Snipe*, 515 F.3d at 951. Under *Brigham City*, probable cause to search a place exists when law enforcement officers have an objectively reasonable basis for concluding that an emergency is unfolding in that place. *Snipe*, 515 F.3d at 952. In light of *Brigham City*, the Ninth Circuit adopted “a two pronged test that asks whether: (1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search’s scope and manner were reasonable to meet the need. Under this test, if law enforcement, while responding to an emergency, discovers evidence of illegal activity, that evidence is admissible even if there was not probable cause to believe that such evidence would be found.” *Snipe*, 515 F.3d at 952.

...

1 **1. Whether Officer Dong's Initial Entry Was Justified Under the Exigent**
 2 **Circumstances Exception.**

3 The first question is whether Officer Dong's initial entry into the house was justified under
 4 the exigent circumstances exception. In *United States v. Valles-Valencia*, 811 F.2d 1232, 1236 (9th
 5 Cir. 1987), the court upheld the officers' warrantless entry into a house to investigate a possible
 6 burglary. The court stated:

7 The circumstances known to the officers supported probable cause to
 8 enter the building to learn what was happening. After the officers
 9 entered the upstairs and arrested Soto-Leal and Bustamante, they
 10 were justified in conducting a protective sweep of the remaining
 rooms. They reasonably believed that "there might be other persons
 on the premises who could pose some danger to them." *United*
 States v. Gardner, 627 F.2d 906, 909-10 (9th Cir. 1980).

11 Other federal circuits have also held that a warrantless entry into a house is justified when
 12 the police officers have probable cause to believe that a burglary is in progress. *United States v.*
 13 *Brown*, 449 F.3d 741, 748 (6th Cir. 2006); *United States v. McCullough*, 457 F.3d 1150, 1164
 14 (10th Cir. 2006). In *Brown*, the Sixth Circuit stated as follows:

15 This and other circuits have held that an officer may lawfully enter a
 16 residence without a warrant under the exigent circumstances
 17 exception when the officer reasonably believes a burglary is in
 18 progress. *United States v. Estese*, 479 F.2d 1273, 1274 (6th Cir.
 19 1973) (holding warrantless search of residence was justified because
 20 there was probable cause to believe burglary was in progress); *see*
 21 *also [United States v. Johnson*, 9 F.3d 506, 509 (6th Cir. 1988)]
 22 (noting that several other circuits "have upheld warrantless searches
 23 conducted during burglary investigations under the rubric of exigent
 24 circumstances") (citing cases). When probable cause exists to
 25 believe a burglary is in progress, officers are presented with exigent
 26 circumstances justifying their warrantless entry into the residence
 27 "because '[i]t would defy reason to suppose that [the officers] had to
 28 secure a warrant before investigating, leaving putative burglars free
 to complete their crime unmolested.'" *Johnson*, 9 F.3d at 510
 (quoting *United States v. Singer*, 687 F.2d 1135, 1144 (8th Cir. 1982)
 (alterations in original), *adopted in relevant part*, 710 F.2d 431 (8th
 Cir. 1983).

449 F.3d at 748.

26 Defendant stated in his motion to suppress that it was unclear from the police reports
 27 whether Officer Dong knew the suspected intruder had already left the property before he entered
 28 the house. Defendant conceded that if Officer Dong believed that the burglary was still in progress,

1 he would have been justified in entering the house so long as his belief was objectively reasonable.
2 *Motion to Suppress* (#51), pg. 5. Officer Dong testified that he did not know the suspect had left
3 Defendant's home prior to his initial entry. Officer Dong indicated that he went directly to
4 Defendant's house. He did not speak to the neighbor who reported the possible break-in before
5 entering the house.

6 Officer Dong estimated that he arrived at Defendant's house 10-20 minutes after the
7 neighbor called the police. As discussed hereinafter, the accuracy of Officer Dong's time estimates
8 are subject to some doubt. It appears, however, that Officer Dong arrived at the house within a
9 sufficiently short time after the neighbor's call, such that it was reasonable to believe that the
10 intruder or burglar was still in the house. Upon arrival, Officer Dong observed the broken
11 Constable's sticker on the front door which was locked. He proceeded around the side of the house
12 where he observed a broken window. He then found an open back door that led into the basement.
13 These observations, combined with the neighbor's report, provided Officer Dong with probable
14 cause to enter the house and conduct a search for an intruder or burglar.

15 Officer Dong and Officer Rossi conducted a search of the house to determine if anyone was
16 inside the residence. During that search, Officer Dong entered the bedroom near the kitchen where
17 he observed the suspicious items in plain view. Officer Dong contacted the Narcotics Bureau
18 sergeant regarding what he had observed. He then exited the house to await the arrival of the
19 narcotics detective(s). It does not appear that Officer Dong expanded the scope of the search after
20 discovering the suspicious items. The scope and manner of Officer Dong's initial entry and search
21 of the house was reasonable and was therefore lawful under the exigent circumstances exception to
22 the Fourth Amendment's warrant requirement.

23 **2. Whether the Second Warrantless Entry to Investigate the Possible**
24 **Illegal Drug Laboratory Was Justified Under the Exigent**
Circumstances Exception to the Warrant Requirement.

25 The second question is whether Detective Dockery's and Officer Dong's subsequent
26 warrantless entry into the house was also justified under the exigent circumstances exception.
27 There are circumstances where the discovery of a suspected narcotics laboratory clearly justifies a
28 warrantless entry to protect the safety of the occupants, neighbors and the police officers. In *United*

1 *States v. Cervantes*, 219 F.3d 882 (9th Cir. 2000), the court upheld the officer's warrantless entry
2 into an apartment to investigate a suspected methamphetamine lab. The officer had been called to
3 the scene by the firefighters who suspected the presence of a drug lab because of the strong
4 chemical odor emanating from the apartments. The court cited the following facts which justified
5 the officer's warrantless entry:

6 Officer Yergler was faced with a terrible, "sickening" chemical odor
7 coming from Apartment 3, which he could smell as much as 20 feet
8 away from the apartment. Officer Yergler, as well as the firefighters
9 who summoned him, believed that the fumes might be associated
10 with methamphetamine production. Officer Yergler knew from his
11 training that methamphetamine labs are volatile and therefore
12 reasonably feared that Apartment 3 could explode at any moment.
13 *See United States v. Whitten*, 706 F.2d 1000, 1014 (9th Cir. 1983)
14 (recognizing that methamphetamine labs create a risk of explosion).
15 Officer Yergler also reasonably believed that lives were in danger if
16 an explosion occurred. This fear was heightened by the fact that the
17 odor was coming from an apartment building, possibly containing
18 many people. *Cf. United States v. Martin*, 781 F.2d 671, 674 (9th
19 Cir. 1985) (holding that a potential explosion within an apartment
20 increases the likelihood of finding exigent circumstances).
21 Moreover, Officer Yergler testified that he witnessed several children
22 around the apartment building. One of the apartment building's
23 tenants had left her apartment fearing harm to herself or to her infant
24 child. Given all of these circumstances, Officer Yergler reasonably
25 believed that an emergency was at hand and that his assistance was
26 immediately necessary for the protection of life.

17 *United States v. Cervantes*, 219 F.3d at 890-91.

18 The facts of this case are obviously not as extreme in regard to the risk of danger to life and
19 limb, as those which confronted the police officer in *Cervantes*. The Ninth Circuit has, however,
20 also upheld warrantless entries to investigate a suspected drug lab under less extreme circumstances
21 than those present in *Cervantes*.

22 In *United States v. Williams*, 630 F.2d 1322 (9th Cir. 1980), border patrol officers opened
23 the trunk of an automobile which they suspected contained smuggled aliens. Instead, they found
24 several cardboard boxes containing beakers, plastic bags filled with white powder and wet paper
25 towels that reeked of a strong chemical order. Based on this discovery, the officers conducted an
26 initial search of a nearby motor home which had been traveling with the automobile. The officers
27 found some evidence that the motor home was being used as a drug lab. Narcotics officers were
28 then summoned to the scene and conducted a further search of the motor home which resulted in

1 the discovery of additional evidence that the motor home was being used as a PCP drug lab. In
2 evaluating whether the warrantless search of the motor home was lawful, the court equated it to a
3 house for purposes of the Fourth Amendment. The court held that the search of the motor home
4 were justified under the exigent circumstances exception based on the officers' testimony that they
5 entered the motor home because of the volatility of half manufactured PCP. The court held that
6 "the trial court could find that manufacture of this particular controlled substance under these
7 conditions created special dangers." *Williams*, 630 F.2d at 1327.

8 In *United States v. Echegoyen*, 799 F.2d 1271 (9th Cir. 1986), sheriff's deputies were
9 summoned to a house located in a rural area by a neighbor who smelled a chemical odor emanating
10 from the property. One of the officers recognized the odor of ether emanating from the house. The
11 officers summoned the fire department to the scene. The firefighter who responded believed that
12 flammable ether posed a serious fire hazard. The officers then entered the house, and arrested the
13 occupants as they attempted to flee. After the suspects were in custody, the officers and firefighters
14 re-entered the house and turned off the gas burners on the stove, opened the windows to ventilate
15 the house and inspected the residence for other open flames. The officers and firefighters then
16 exited the residence. The officers requested that narcotics officers come to the house to take over
17 the investigation. "Two narcotics agents arrived and entered the residence. Based on what they
18 saw and what was told to them by other detectives, the narcotics agents left the area to obtain a
19 search warrant. The agents returned, executed the warrant, and seized the chemicals, equipment
20 and cocaine. Prior to that time, nothing had been removed from the residence." 799 F.2d at 1274.

21 In upholding the officer's initial entry under the exigent circumstances exception, the court
22 stated "that the existence of an explosive fire hazard and the possibility of illegal drug activity were
23 exigent circumstances that justified the initial warrantless entry. The deputies' testimony as to the
24 chemical smell, the activity in the cabin, the early morning hour, the remoteness of the Idyllwild
25 area, and the limited availability of firefighting resources all justify the initial entry." *Echegoyen*,
26 799 F.2d at 1279. The court also held that the officers did not have the ability to obtain a telephone
27 search warrant within sufficient time to avoid the undue risk of danger that would result from
28 further delay before entering the house. *Id.* at 1279-80. Finally, the court held that the narcotics

1 officers' subsequent entry did not violate the warrant requirement based on the Supreme Court's
2 decision in *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942 (1978). The court stated:

3 In *Tyler*, a fire broke out in a furniture store. The firefighter entered
4 the building to put out the fire. Evidence of arson was found in the
5 store, and a fire detective was called to the scene. He attempted to
6 investigate the scene, but heavy smoke forced him to leave the
7 premises. Four hours later the detective returned, entered the store to
8 inspect the burned property, and removed physical evidence from the
9 scene. The *Tyler* Court upheld the initial entry as justified by the
10 exigency created by the fire. Significantly, the *Tyler* Court also held
11 that the re-entry later in the day was "no more than an actual
12 continuation of the first, and the lack of a warrant thus did not
13 invalidate the resulting seizure of evidence." 436 U.S. at 511, 98
14 S.Ct. at 1951. In the instant case, the subsequent entry by the
15 narcotics officers was based on the need to use their expertise in
16 inspecting the premises for a possible fire hazard. Consequently, this
17 second entry was merely a continuation of the initial lawful entry
18 because both were done to alleviate the exigent circumstances.
19 Accordingly, any evidence observed in plain view while making this
20 entry should not be suppressed.

21 799 F.2d at 1280.

22 See also *Fisher v. City of San Jose*, 558 F.3d 1069, 1077 (9th Cir. 2009) (analyzing *Tyler*
23 and *Echegoyen* in the context of an armed standoff).

24 The facts of this case are distinguishable from *Tyler* and *Echegoyen* in that Officer Dong's
25 initial entry into the house was made to investigate a possible burglary and not a fire or suspected
26 drug laboratory. That distinction, however, does not necessarily lead to a different conclusion
27 regarding the legality of the second entry. Although Officer Dong did not find an intruder, he did
28 observe items which caused him to suspect the presence of an illegal drug lab. The suspicious
items included the dark liquid in the jars, the written equation, the powdery substance in the plastic
bags, lye, drain cleaner, and the respirator. Officer Dong knew from his training and experience
that some of the items were associated with illegal methamphetamine labs. He did not know,
however, whether the suspect items were, in fact, being used to make methamphetamine. Officer
Dong did not smell any chemical odors or see open flames or evidence of actually cooking in the
residence. Officer Dong was aware, however, that some chemicals are combustible or present a
danger of explosion even if no heat source is present. He was also aware that hazardous gases or
fumes are associated with illegal drug production, although he did not smell any odor indicating the

1 presence of such gases.

2 Like the sheriff's deputies in *Echegoyen*, Officer Dong contacted the narcotics bureau to
3 obtain assistance in evaluating what he had observed inside the house. According to Officer Dong,
4 Detective Dockery arrived at the house approximately 30 minutes later. Based on Officer Dong's
5 reported observations, Detective Dockery believed that some type of drug lab was located in the
6 house and that it was possible that the liquid in the jars was methamphetamine. Although Officer
7 Dong did not observe any open flames or ongoing cooking, Detective Dockery also testified that
8 some volatile chemicals used in illegal drug manufacturing can explode absent an open flame or
9 other heat source. Detective Dockery also testified that odorless phosphine gas, which is a by-
10 product of methamphetamine production, might have been present in the house if the suspect lab
11 was, in fact, a methamphetamine lab. There is no evidence, however, that Officer Dong was
12 displaying any symptoms to indicate he had been exposed to phosphine or some other hazardous
13 gas.

14 Detective Dockery testified that his purpose in entering the house was to determine whether
15 the suspect lab posed a risk of danger to the officers or other persons in the vicinity. Clearly,
16 Detective Dockery was not presented with the level of potential danger that faced the first
17 responding officer in *Cervantes*, or even the sheriff's deputies who made the initial entry in
18 *Echegoyen*. Detective Dockery's entry into the house was, however, comparable to the entries
19 made by detectives in *Williams*, *Echegoyen* and *Tyler* who arrived after the immediate risk of
20 danger had been substantially reduced by the first responders.

21 Officer Dong and Detective Dockery testified that they proceeded directly to the bedroom
22 where the suspicious items were located and, upon Detective Dockery completing his inspection,
23 exited the house by the same route. They did not enter other areas of the house. Although Officer
24 Dong testified that they were inside the house for 10-15 minutes, Detective Dockery estimated that
25 he was in the bedroom for approximately one minute, and inside the house for a total of one minute
26 and fifteen seconds. Neither officer's time estimate is necessarily accurate or reliable. It probably
27 took longer than one minute and fifteen seconds for Detective Dockery to enter the house, inspect
28 and assess the suspect items and then exit the house. Detective Dockery stated in his search

1 warrant declaration that he observed “several bags of mimosa roots, bottles of lye, cans of Naptha
2 fuel and several jars of brown liquid. . . . A recipe for the extraction process was on top of the jars
3 of suspicious brown liquid.” *Search Warrant Declaration*, pg. 35. On the other hand, it would not
4 necessarily have taken Detective Dockery a substantial amount of time to make these observations.
5 There is no indication that Detective Dockery did anything more than inspect the items in the
6 bedroom that Officer Dong had reported as being suspicious for an illegal drug lab. Officer Dong’s
7 estimate that they were in the house 10-15 minutes may therefore be excessive.

8 The Court concludes, based on the authority of *Tyler* and *Echegoyen*, that it was objectively
9 reasonable for Detective Dockery to enter the house to inspect the suspicious items already
10 observed by Officer Dong during his entry and to assess whether they posed an immediate risk of
11 danger to the officers or other persons in the vicinity. The Court also finds that the scope and
12 manner of Detective Dockery’s entry and search was reasonable in response to the exigencies
13 presented. He went only to the bedroom where Officer Dong had observed the suspect drug lab.
14 After inspecting and assessing those items, Detective Dockery and Officer Dong left the residence.
15 Although Detective Dockery also observed the presence of Naptha during his entry, there is no
16 reason to doubt his testimony that the Naptha cans were in plain view as he proceeded to or from
17 the bedroom.

18 During his inspection, Detective Dockery observed the “mimosa hostilis” label on the
19 plastic bags containing the reddish powder. This led him to discover the existence of
20 Dimethyltryptamine (DMT), a Schedule I controlled substance, of which he had previously been
21 unaware. He was also able to connect the other items found in the bedroom, including the written
22 equation, to the production of Dimethyltryptamine (DMT). Without the information that Detective
23 Dockery obtained during his entry, there would not have been sufficient information in the search
24 warrant declaration to support a finding of probable cause. The declaration’s statement that
25 “Officer Dong observed jars of suspicious brown liquid, lye, and other items he believed to be
26 associated with controlled substances,” standing alone, was too general to support a finding of
27 probable cause. Because Detective Dockery’s entry into the house was also reasonable, his
28 observations were lawfully included in the declaration and supported a finding of probable cause

1 for the issuance of the search warrant.

2 **CONCLUSION**

3 The Court concludes that the Officer Dong's and Detective Dockery's warrantless entries
4 into Defendant's house were objectively reasonable and justified under the exigent circumstances
5 exception to the Fourth Amendment's warrant requirement. The evidence that was discovered as a
6 result of those entries was therefore lawfully obtained and legitimately supported the issuance of
7 the search warrant. Accordingly,

8 **RECOMMENDATION**

9 **IT IS RECOMMENDED** that Defendant's Motion to Suppress Evidence for Fourth
10 Amendment Violation (#51) be **denied**.

11 **NOTICE**

12 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be
13 in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has
14 held that the courts of appeal may determine that an appeal has been waived due to the failure to
15 file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit
16 has also held that (1) failure to file objections within the specified time and (2) failure to properly
17 address and brief the objectionable issues waives the right to appeal the District Court's order
18 and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153,
19 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

20 DATED this 22nd day of July, 2013.

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23 GEORGE FOLEY, JR.
24 United States Magistrate Judge
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